

In the Matter of John Albano, Fire Captain (PM3542L), Village of Ridgewood
CSC Docket Nos. 2012-348 and 2012-1500
(Civil Service Commission, decided August 1, 2012)

John Albano, a Fire Lieutenant with the Village of Ridgewood, represented by Emil S. Cuccio, Esq., appeals the bypass of his name on the June 1, 2011 certification of the Fire Captain (PM3542L) eligible list. Additionally, the former Division of State and Local Operations (SLO)¹ requests enforcement of Certification No. PL110592.

The appellant's name appeared on the subject eligible list, which was certified to the appointing authority on June 1, 2011. The appellant, a veteran, appeared in the second position on the certification.² In disposing of the certification, the appointing authority bypassed the first ranked eligible, Christopher DuFloucq (DuFloucq) and the appellant and appointed the third eligible, Robert Kozielski (Kozielski), effective June 27, 2011. Then, the appointing authority appointed DuFloucq, effective July 21, 2011.

On appeal to the Civil Service Commission (Commission), the appellant alleges that the appointing authority violated the provisions of the New Jersey Administrative Code dealing with veteran's preference, by not appointing the appellant to one of the two available vacancies. Additionally, he asserts that the appointing authority failed to submit a statement of reasons for bypassing him for the first vacancy. The appellant states that the appointing authority's failure to appoint him was arbitrary, capricious and unreasonable. Moreover, he argues that, in the past, the appointing authority has followed the recommendation of the current Fire Chief to fill vacancies within the department, but deviated from standard practice by failing to do so in this instance. Further, the appellant alleges anti-union animus of the appointing authority and contends he is in a protected class because of his union status. In support of his contentions, the appellant submits an interoffice memorandum and email from present Fire Chief Van Goor indicating support for the appointment of the first-ranked eligible and the appellant, respectively. He also submits a letter from the former Chief indicating support for the appellant's appointment to the title of Captain as well as a letter from DuFloucq, which stated that he was never brought in for a second interview, but rather was offered the second vacancy when he was called into the Village Manager's office during the week of July 18th.³

¹ Now the Division of Classification and Personnel Management.

² The appellant originally ranked third on the eligible list. However, the second-ranked eligible, James Van Goor, was promoted to the position of Fire Chief, thereby making the appellant the second-ranked eligible on the certification.

³ It is noted that the letter from former Fire Chief James Bombace is unsigned.

In response, the appointing authority states initially that DuFloucq and Kozielski were more qualified and better suited for the positions. Following a request for further clarification, the appointing authority alleges that Kozielski was appointed first because Kozielski had the strongest interview responses, showed “long-term thinking, innovation and common sense needed for the position”, and his understanding of the role of the Volunteer Firefighters was in line with the long-term management of the appointing authority. The appointing authority advised that DuFloucq demonstrated a reluctance to support the selection of the most qualified department staff, displayed a misconception as to the role of the Volunteer Firefighters and made comments viewed as unsupportive of the current Fire Chief. It also asserts that the appellant was bypassed in favor of Kozielski because his interview responses were not as strong as Kozielski’s responses. Additionally, the appointing authority contends that the appellant demonstrated an inflexibility to embrace the current staffing structure and made the statement “life would be better if we got back to the old ways,” which the appointing authority interpreted to lack long-term thinking, innovation and common sense. The appointing authority asserts that after it appointed Kozielski, it re-reviewed candidate documentation and brought DuFloucq in for a second interview. Moreover, it notes that the separate appointment dates were correct and intentional since Kozielski was clearly its first choice and the selection of a second appointee took additional review and interview. Finally, the appointing authority contends that it has followed the “rule of three” and made the appointments in accordance with Civil Service rules.

SLO did not approve the disposition of the certification upon its return; rather, it returned it to the appointing authority for correction. Specifically, on September 8, 2011, SLO sent a notice advising that the disposition paperwork was not signed by the appointing authority and disposition of eligibles ranked 1, 2, and 3 were missing. SLO advised the appointing authority that if a lower or equal ranked eligible is appointed, the appointing authority must provide a brief, positive, specific statement as to why such a decision was made. Subsequently, SLO notified the appointing authority on September 13, 2011 that the disposition of the certification was, once again, not approved and requested a reason why the second appointed eligible was not able to have the same appointment date as the first appointed eligible. Based on the appointing authority’s response, SLO referred the matter to the Division of Merit System Practices and Labor Relations for enforcement.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. At the time of disposition of this certification, *N.J.A.C.* 4A:4-4.8(b)4 stated that in disposing of a certification, an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score. *See also, In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38 (2011) (Supreme Court held that, as bypassing a higher-ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason).⁴ *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper. Additionally, *N.J.A.C.* 4A:5-2.2(e) provides that, when there is more than one vacancy, and a veteran is ranked first on the certification as a result of the first appointment from the certification, then a veteran must be appointed to the next vacancy.

Moreover, in a case of this nature where dual motives are asserted for an employer's action, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. *See Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision. If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

⁴ At its meeting of April 4, 2012, the Commission approved the adoption of an amendment to *N.J.A.C.* 4A:4-4.8, Disposition of a certification, which would delete the requirement for a statement of reasons, paragraph (b)4, of the rule. The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*.

The Commission has reviewed this matter and finds that the appellant has not presented any evidence to sustain his claim of retaliation for union activities. Although the appellant alleges that the appointing authority has made anti-union statements, he has not provided any specific information or evidence to support this claim.

However, it is noted that a request for enforcement was issued by the SLO's Certification Unit. Specifically, it was requested that the appointing authority provide a reason why the second appointee did not have the same appointment date as the first appointee. Although the appointing authority asserts that the later appointment date was due to additional review and interviewing of candidates, that claim is refuted by evidence in the record that there were no additional interviews of either DuFloucq or the appellant before DuFloucq was appointed. Additionally, although the appointing authority provides detailed reasons for bypassing DuFloucq and the appellant in favor of Kozielski, those reasons are contradicted by evidence in the record. Specifically, the appointing authority states that it bypassed both DuFloucq and the appellant because their interview responses were not as strong. Moreover, the appointing authority advised that DuFloucq demonstrated a reluctance to support the selection of the most qualified department staff and made comments determined to be unsupportive of the current chief. Further, the appointing authority found that the appellant's interview responses demonstrated inflexibility and a lack of forward thinking. However, the appellant submitted documentation contradicting all of these reasons. Most notable is the letter from the current Fire Chief which states that, although both DuFloucq and the appellant initially demonstrated reluctance to support the new organizational plan, they both worked very hard to implement the plan, showing "they are willing to make changes, take on more responsibility and work." Chief Van Goor cited the need for strong and well-respected leaders when recommending DuFloucq and the appellant for appointment to the two vacancies. Moreover, a letter from DuFloucq contradicts the appointing authority's contention that it conducted additional interviews before appointing an eligible to the second vacancy. Rather, it simply waited a few weeks and then appointed DuFloucq. Since no good reason for the separate appointment dates can be found in the record, both appointees should have the same appointment date or June 27, 2011.

Further, there is no evidence that the appointing authority did not have two vacancies to fill as of June 27, 2011. Thus, it appears that DuFloucq's later appointment date was aimed at circumventing the Civil Service rules governing veteran's preference. In this regard, as a result of the determination that both appointees should have the same appointment date, the appellant was improperly bypassed. Upon appointment of DuFloucq, the appellant became the first-ranked eligible, and his appointment to the second vacancy is mandated by *N.J.A.C. 4A:5-2.2(e)*. See *In the Matter of Thomas D'Angelo* (MSB, decided October 22, 2003)

(Once the number one non-veteran eligible indicated he was not interested in the position, the appellant, who was the number two veteran eligible, become the number one interested veteran eligible and Board mandated his appointment). Accordingly, the appellant, John Albano, shall be appointed to the position of Fire Captain, in accordance with Civil Service rules. If the appointing authority does not have a current vacancy for Fire Captain it is ordered that Robert Kozielski's conditional appointment to Fire Captain be rescinded. See N.J.A.C. 4A:4-1.4(a) and (b).

ORDER

Therefore, it is ordered that this appeal be granted and John Albano receive an appointment from the certified eligible list for Fire Captain effective June 27, 2011. Further, it is ordered that the appointing authority notify the Division of Classification and Personnel Management within 20 days of the issuance of this decision whether Robert Kozielski's conditional appointment is rescinded. If the appointing authority does not adhere to this time frame, or otherwise not comply with this determination, it shall be assessed a \$100 fine per day for each day of noncompliance up to a maximum of \$10,000.

Additionally, it is ordered that Christopher DuFloucq's appointment date be amended to June 27, 2011.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.